Schmidt Scientific Sdn Bhd v Ong Han Suan

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-410 OF 1994
KAMALANATHAN RATNAM JC
26 JUNE 1997

Labour Law *— Employment — Employee's duty — Duty of fidelity and good faith — Whether there is an implied duty that prohibits the employee from using any confidential information obtained during his employment, without the employer's consent, for his own or someone else's use after the employment contract ends — Whether a third party to whom the information was wrongfully revealed also came under a duty of confidence to the original confider*

Labour Law *— Employment — Employee's duty — Duty of fidelity and good faith — Confidential information and trade secrets — Whether 'configuration' of data for the purpose of arriving at the selling price confidential information — Whether trade secret include list of name and addresses of customer and suppliers, specific questions sent to customers, costs prices, specific needs of customers and status of the ongoing negotiation with customers — Whether ex-employees are entitled to make use or make copies of such information for the benefit of third party in competing with the ex-employer's business*

Tort *— Breach of confidence — Disclosure of confidential information and/or trade secrets of ex-employer — Whether breach of confidentiality was a tortious act — Whether damages could be awarded to the successful plaintiff*

Evidence *— Documentary evidence — Computer printout — Admissibility — Certificate required under s 90A of the Evidence Act 1950 was tendered by witness during examination — Whether computer printout was admissible — Evidence Act 1950 ss 90A & 90A(2)*

Contract *— Restraint of trade — Injunction to restrain ex-employees from using, disclosing and/or divulging confidential information and/or trade secrets of an ex-employer — Whether injunction amounts to a restraint of trade*

Civil Procedure *— Injunction — Injunction to restrain use or disclosure of confidential information —Delay of 18 months — Whether delay was acceptable — Whether court was bound by its earlier decision in rejecting application for interlocutory injunction*

Civil Procedure *— Disqualification of judge — Whether there was any bias or real possibility that judge would be biased in his judgment — Whether it would be an abdication of judicial function and an encouragement of procedural abuse if judge were to remain disqualified*

The plaintiff dealt in very specialized equipment and instruments imported from an overseas principal/supplier ('Tabai Espec Corp') to be sold to various hospitals, research centres, universities and industries throughout Malaysia. The plaintiff had signed an exclusive distributorship agreement with Tabai Espec Corp for the sale of testing equipment ('the Tabai products') but the agreement was made non-exclusive when the fifth defendant was appointed as a distributor in April 1994. The sale of other testing equipment ('Suga products') was made through Yamato Scientific Co Ltd ('Yamato') which would only sell to the plaintiff in Malaysia.

A The first, second, third and fourth defendants were at all material times employees who resigned from the plaintiff at different times between December 1992 and December 1993. They were the only shareholders and directors of the fifth defendant company incorporated on 6 December 1993. Between December 1993 and January 1994, the fifth defendant had approached the existing three customers of B the plaintiff. At the material time, the fifth defendant was not the authorized agent/distributor for the sale of Tabai and Suga products. The quotations sent out by the fifth defendant to these customers were in respect of the same equipment/instruments for which the plaintiff had earlier given its quote with the exact specifications C except that the fifth defendant had quoted a reduced price. The plaintiff contended that it had suffered losses by reason of a special discount which it had to give to two of these customers as a result of the fifth defendant's low quotation while its sale to the third customer was lost to the fifth defendant.

D The plaintiff claimed against the defendants for, inter alia, an injunction to restrain the fifth defendant from: (i) using, divulging and/or disclosing any confidential information and/or trade secrets of the plaintiff; (ii) approaching any suppliers of the plaintiff with the view to induce them to apppoint the fifth defendant or whomsoever as the agent/distributor of their products; (iii) placing and/or soliciting E orders from any supplier of the plaintiff with the view to obtain supply of their products for whom the plaintiff were the exclusive agents/distributors; and (iv) taking and/or soliciting orders or otherwise dealing with each and every customer of the plaintiff.

The plaintiff alleged that the defendants had breached their duty F of fidelity and good faith while in the employment of the plaintiff by taking away and making copies of the confidential information and/or trade secrets of the plaintiff. The defendants denied the allegation and contended that they had received market information from the suppliers and customers. No evidence however was tendered to support this line of defence. The defendants further submitted, inter G alia, that: (i) the plaintiff's action amounted to a restraint of trade and therefore must fail; (ii) the documents referred to by the plaintiff as being confidential was merely a 'configuration' of data supplied by the manufacturers for the purpose of arriving at the selling price, it was neither unique intellectual work nor ingenious; (iii) the delay of H 18 months before the writ was finally filed was unacceptable; (iv) the court was bound by its decision in rejecting a prior application for interlocutory injunction; and (v) the computer printout of documents in the plaintiff's bundle of documents was inadmissible as no certificate as required under s 90A(2) of the Evidence Act 1950 ('the Act') was tendered before the court, although such certificate was tendered I when the managing director of the plaintiff took the stand. A further issue was whether there was an action in tort for breach of confidence.

During the trial, the defendants' lawyer ('counsel') obtained a discharge on the ground that his clients — after hearing the questions

directed to counsel by the court — felt that the court might be prejudiced against him. Therefore, the judge disqualified himself from further hearing the case and directed that the case be transferred to another court of the same division ('the direction'). However, subsequently counsel reappeared as co-counsel for the defendants. The issue was whether the direction made could be set aside by the same judge.

Held, allowing the claim:

(1) The duty of good faith or fidelity does not only require that the employee refrains from misuse or from disclosing information whilst still in the employment of the employer. There is an implied duty that prohibits the employee from using any confidential information obtained during his employment, without the employer's consent, for his own or someone else's use after the employment contract ends.

In this case, apart from the general duty of good faith and fidelity, the first, second, third and fourth defendants — and through them the fifth defendant — as ex-employees were also under an implied duty not to use, divulge and/or disclose to whomsoever, any confidential information and/or trade secrets obtained during the course of their employment with the ex-employer after the employment had ceased for their own or the fifth defendant's benefit to the detriment of the plaintiff. On the facts, the defendants herein had used, divulged and/or disclosed confidential information and/or trade secrets of the plaintiff.

Further, the defendants who came into possession of confidential information, knowing it to be such, came under a duty not to take unfair advantage of it or to make use of it to the prejudice of him who gave it without obtaining his consent. Thus, the fifth defendant to whom the information had been wrongfully revealed also came under a duty of confidence to the original confider, ie the plaintiff. It was therefore necessary to grant the equitable relief of an injunction against the fifth defendant as well as against the rest of the defendants (see pp 644C–D, 645F–G and 646B–C); *Robb v Green* [1895] QB 315, *Merryweather v Moore* [1892] 2 Ch 518, *Seager v Copydex Ltd* [1967] 2 All ER 416 and *Coco v AN Clark (Engineers) Ltd (No 2)* [1969] RPC 41 followed.

(2) Trade secrets are not limited to manufacturing processes or secret formulae but extend to information relating to the list of names and addresses of the customers and suppliers, specific questions sent to the customers, costs prices, specific needs and requirements of the customers and status of the ongoing negotiation with the customers. In the light of the particular trade setting of the plaintiff's business, such information would have the necessary quality of confidentiality. The first, second, third and fourth defendants were therefore not entitled to make

A use or make copies of such information for the benefit of the fifth defendant in competing with the plaintiff's business (see pp 648I and 649A–B).

(3) The plaintiff was entitled to rely on an irresistible inference that the defendants had made use of the confidential information and/or trade secrets of the plaintiff because of the admitted similarity of the quotation sent out by the plaintiff and the fifth defendant to the overseas principal/supplier and the other so-called coincidences of the fifth defendant approaching the other customers of the plaintiff for the sale of identical equipment with the exact specifications, except for a lower price. No plausible explanation was given by the defendant in respect of such coincidences within such a short time after the fifth defendant was incorporated. No evidence was led to show that the fifth defendant knew of the customers' needs and requirements through negotiations/discussions with them. In the absence of such evidence, it was an irresistible inference which the court drew that such information had been obtained from the plaintiff (see pp 649D–E and 651C–D).

(4) It was not the plaintiff's case to restrain the defendants from entering into the same trade as the plaintiff. The plaintiff's case was to restrain them from using, disclosing and/or divulging confidential information and/or trade secrets of the plaintiff to the detriment of the plaintiff. Clearly, the allegation of restraint of trade must fail (see p 652B–C).

(5) Even though the information was merely a 'configuration' of data supplied by the manufacturers for the purpose of arriving at the selling price, what made it confidential was the compilation of lists of the names and addresses of customers and their budget and the costs and prices of the equipment obtained from the overseas principal/supplier. The defendants had saved themselves the time and trouble of having to go through laborious discussions and negotiations with the customers, the effort put in to compile the list of names and addresses of customers and suppliers and above all the costs and prices which were only available from the overseas principal/supplier (see p 652D–F).

(6) The delay of nearly 18 months before the writ seeking, inter alia, injunction against the defendants, was acceptable. An interlocutory or interim injunction is granted before the trial of an action, its object being to maintain status quo until the question at issue between the parties can be determined at trial. Therefore, a lesser degree of delay or laches suffices to debar the plaintiff from seeking interlocutory relief than from obtaining a permanent injunction, for the reason that a refusal of an interlocutory injunction is merely a temporary rebuff, whereas the refusal of a permanent injunction at the trial of the action shows that the plaintiff has failed to establish the existence of its right in law. Moreover, interlocutory injunction is granted only

in matters of urgency, so that a plaintiff who delays thereby demonstrates the absence of any urgency requiring prompt relief. Delay is, however, less significant, in a suit, seeking final, as opposed to interlocutory relief (see pp 652I and 653A–C); *Alfred Templeton v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 followed.

(7) A breach of confidence should also be regarded as a tort with damages to be awarded to the successful plaintiff. Since the categories of tortious liability remain open, the ingenuity and resourcefulness of the human mind can and ought to lead to fresh categories of tort being established, and this would include tort for breach of confidence (see p 653E–F).

(8) The defendants' objection as to the admissibility of computer printouts of documents contained in the plaintiff's bundle of documents and that the same be marked for identification only was highly improper and misleading. The objection was made pursuant to s 90A of the Act. The section requires that before such a document is admitted, there must be tendered to the court a certificate signed by a person who either before or after the production of the document by computer is responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used. However, the managing director of the plaintiff had tendered by consent the certificate required under s 90A(2) of the Act during trial and the certificate together with the computer printout documents were marked as one of the plaintiff's exhibits (see p 654D–F).

(9) When counsel reappeared as co-counsel, it seemed to be nothing more than an attempt by counsel to return to the case after the judge had disqualified himself. In the circumstances, it would be falling in line with the wishes of counsel for the defendants if the judge continued to remain disqualified.

Further, as there would be no bias or any real possibility that the court would be biased, it would be an abdication of judicial function and an encouragement of procedural abuse if the judge were to remain disqualified. Moreover, the direction made had not been drawn up or perfected. Thus the direction made was set aside (see pp 655I and 656A–C); *Hock Hua Bank (Sabah) Bhd v Yong Link Thin & Ors* [1995] 2 MLJ 213 and *Wong Foot Choy & Ors v Toong Hup (M) Sdn Bhd & Ors* [1996] 1 AMR 402 followed.

[Bahasa Malaysia summary

Plaintif berniaga dalam kelengkapan dan instrumen yang amat khusus yang diimport dari suatu prinsipal/pembekal luar negeri ('Tabai Espec Corp') untuk dijual kepada pelbagai hospital, pusat penyelidikan, universiti dan industri di seluruh Malaysia. Plaintif telah menandatangani suatu perjanjian pengedaran yang eksklusif dengan Tabai Espec Corp untuk jualan kelengkapan ujian ('keluaran Tabai')

A tetapi persetujuan menjadi tidak eksklusif apabila defendan kelima dilantik sebagai pengedar pada April 1994. Jualan kelengkapan ujian lain ('keluaran Suga') dibuat menerusi Yamato Scientific Co Ltd ('Yamato') yang hanya menjual kepada plaintif di Malaysia.

Defendan-defendan pertama, kedua, ketiga dan keempat pada
B semua masa material merupakan pekerja yang meletak jawatan daripada plaintif pada masa berlainan antara Disember 1992 dan Disember 1993. Mereka merupakan pemegang saham dan pengarah tunggal syarikat defendan kelima yang ditubuhkan pada 6 Disember 1993. Antara Disember 1993 dan Januari 1994, defendan kelima telah mendekati tiga pelanggan plaintif. Pada masa yang material,
C defendan kelima tidak merupakan ejen/pengedar yang diberikuasa untuk jualan keluaran Tabai dan Suga. Sebut harga yang dihantar oleh defendan kelima kepada pelanggan-pelanggan ini adalah berkenaan dengan kelengkapan/instrumen yang sama yang mana plaintif telah menyebut harganya lebih awal dengan spesifikasi yang
D serupa kecuali bahawa defendan kelima telah menyebut harga yang rendah. Plaintif berhujah bahawa ia telah menanggung kerugian disebabkan diskaun istimewa yang terpaksa diberikan kepada dua daripada pelanggan ini akibat sebut harga rendah oleh defendan kelima manakala jualan kepada pelanggan ketiga telah diberikan kepada defendan kelima.

E Plaintif menuntut terhadap defendan-defendan untuk, antara lain, suatu injunksi bagi menahan defendan kelima daripada (i) menggunakan, memaklumkan dan/atau mendedahkan sebarang maklumat sulit dan/atau rahsia perniagaan plaintif; (ii) mendekati mana-mana pembekal plaintif dengan tujuan mendorong mereka
F melantik defendan kelima atau sesiapa yang lain sebagai ejen/pengedar keluaran mereka; (iii) meletak dan/atau mendapatkan pesanan dari mana-mana pembekal plaintif dengan tujuan mendapatkan bekalan keluaran mereka yang mana plaintif merupakan ejen/pengedar eksklusif; dan (iv) mengambil dan/atau mendapatkan pesanan atau sebaliknya berurusan dengan setiap pelanggan plaintif.

G Plaintif mengatakan bahawa defendan-defendan telah melanggar kewajipan kesetiaan dan suci hati semasa dalam penggajian plaintif dengan mengambil dan membuat salinan maklumat sulit dan/atau rahsia perniagaan plaintif. Defendan-defendan menafikan pengataan itu dan menghujahkan bahawa mereka telah menerima maklumat
H pasaran daripada pembekal dan para pelanggan. Namun demikian tiada keterangan dikemukakan bagi menyokong pembelaan ini. Defendan-defendan seterusnya berhujah, antara lain, bahawa: (i) tindakan plaintif sama seperti suatu penyekatan perniagaan dan oleh itu mestilah gagal; (ii) dokumen yang dirujuk oleh plaintif sebagai
I sulit hanya merupakan suatu 'tatarajah' data yang dibekalkan oleh pengilang-pengilang untuk tujuan mencapai harga jualan, ia tidak merupakan hasil kerja intelektual yang unik atau bijak; (iii) kelewatan selama 18 bulan sebelum writ akhirnya difailkan tidak boleh diterima; (iv) mahkamah adalah terikat oleh keputusannya dalam menolak

permohonan terdahulu untuk injunksi interlokutori; dan (v) cetakan dokumen komputer dalam ikatan dokumen plaintif tidak boleh diterima kerana tiada sijil seperti yang dikehendaki di bawah s 90A(2) Akta Keterangan 1950 ('Akta tersebut') telah dikemukakan di hadapan mahkamah, walaupun perakuan demikian dikemukakan ketika pengarah urusan plaintif memberi keterangan. Isu seterusnya adalah sama ada terdapat tindakan dalam tort untuk pecah amanah. A B

Semasa perbicaraan, peguam defendan-defendan ('peguam tersebut') memperolehi suatu pelepasan atas alasan bahawa kliennya — selepas mendengar soalan-soalan yang dikemukakan kepada peguam tersebut oleh mahkamah — rasa bahawa mahkamah seakan-akan berprasangka terhadapnya. Oleh itu, hakim menarik diri daripada terus mendengar kes dan mengarah supaya kes dipindah ke mahkamah lain dalam bahagian yang sama ('arahan tersebut'). Walau bagaimanapun, berikutnya peguam tersebut muncul semula sebagai peguam bersama bagi pihak defendan-defendan. Isu adalah sama ada arahan tersebut yang dibuat boleh diketepikan oleh hakim yang sama. C D

Diputuskan, membenarkan rayuan:

(1) Kewajipan suci hati atau kesetiaan tidak sekadar menghendaki pekerja menahan diri daripada menyalah guna atau daripada mendedahkan maklumat ketika masih dalam penggajian majikan. Terdapat kewajipan tersirat yang melarang pekerja daripada menggunakan sebarang maklumat sulit yang diperolehi semasa penggajiannya, tanpa kebenaran majikan, sama ada untuk kegunaan sendiri atau kegunaan orang lain selepas tamatnya kontrak penggajian. E

Dalam kes ini, selain daripada kewajipan am suci hati dan kesetiaan, defendan pertama, kedua, ketiga dan keempat — dan menerusi mereka defendan kelima — sebagai bekas pekerja juga wajib secara tersirat untuk tidak menggunakan, memaklumkan dan/atau mendedahkan kepada sesiapa, sebarang maklumat sulit dan/atau rahsia perniagaan yang diperolehi semasa penggajian mereka dengan bekas majikan selepas tamatnya penggajian untuk manfaat sendiri atau manfaat defendan kelima sehingga menjejaskan plaintif. Atas fakta-fakta, defendan-defendan di sini telah menggunakan, memaklumkan dan/atau mendedahkan maklumat sulit dan/atau rahsia perniagaan plaintif. F G

Seterusnya, defendan-defendan yang memiliki maklumat sulit, yang tahu akan ia sulit, berada di bawah kewajipan untuk tidak mengambil kesempatan yang tak adil atasnya atau untuk menggunakannya sehingga menjejaskan orang yang memberikannya tanpa mendapatkan kebenaran. Justeru itu, defendan kelima kepada siapa maklumat telah didedahkan dengan salahnya juga dirangkumi oleh kewajipan amanah kepada pihak mengadu yang asal, iaitu plaintif. Maka adalah perlu untuk memberikan relief ekuiti iaitu injunksi terhadap defendan kelima serta terhadap defendan-defendan yang lain (lihat ms 644C–D, 645F–G dan 646B–C); *Robb v Green* [1895] QB 315, *Merryweather v Moore* H I

A [1892] 2 Ch 518, *Seager v Copydex Ltd* [1967] 2 All ER 416 dan *Coco v AN Clark (Engineers) Ltd (No 2)* [1969] RPC 41 diikut.

(2) Rahsia perniagaan tidak terhad kepada proses pengilangan atau formula rahsia tetapi dilanjutkan kepada maklumat yang berhubung dengan senarai nama dan alamat para pelanggan dan B pembekal, soalan-soalan khusus yang dihantar kepada pelanggan, harga kos, keperluan khusus pelanggan dan taraf perundingan dengan pelanggan yang masih berlangsung. Memandangkan keadaan perniagaan plaintif yang khusus, maklumat sedemikian akan mempunyai mutu kerahsiaan yang dikehendaki. Defendan- C defendan pertama, kedua, ketiga dan keempat dengan itu tidak berhak menggunakan atau membuat salinan maklumat demikian untuk manfaat defendan kelima dalam persaingan dengan perniagaan plaintif (lihat ms 648I dan 649A–B).

(3) Plaintif berhak bergantung kepada inferens bahawa defendan- D defendan telah menggunakan maklumat sulit dan/atau rahsia perniagaan plaintif disebabkan keserupaan sebut harga yang diakui yang dihantar oleh plaintif dan defendan kelima kepada prinsipal/ pembekal luar negeri serta kebetulan lain yang dikatakan bahawa defendan kelima telah mendekati pelanggan lain plaintif untuk jualan kelengkapan yang serupa dengan spesifikasi yang tepat, E kecuali pada harga yang lebih rendah. Tiada penjelasan yang munasabah telah diberikan oleh defendan berhubung dengan kebetulan demikian dalam jangkamasa yang singkat selepas pertubuhan defendan kelima. Tiada keterangan dikemukakan bagi menunjukkan bahawa defendan kelima tahu akan keperluan F para pelanggan melalui perundingan/perbincangan dengan mereka. Dalam ketiadaan keterangan sedemikian, inferens yang dibuat oleh mahkamah adalah bahawa maklumat itu telah diperolehi daripada plaintif (lihat ms 649D–E dan 650C–D).

(4) Bukanlah menjadi kes plaintif untuk menyekat defendan- defendan G daripada menceburi perniagaan yang sama dengan plaintif. Kes plaintif adalah untuk menyekat mereka daripada menggunakan, dan/atau mendedahkan maklumat sulit dan/atau rahsia perniagaan plaintif sehingga menjejaskan plaintif. Maka, pengataan penyekatan perniagaan mesti gagal (lihat ms 652B–C).

(5) Walaupun maklumat itu hanya merupakan 'tatarajah' data yang H dibekalkan oleh pengilang untuk tujuan mencapai harga jualan, apa yang menjadikannya sulit adalah pengumpulan senarai nama dan alamat para pelanggan dan belanjawan mereka dan kos dan harga kelengkapan yang didapati daripada prinsipal/pembekal luar negeri. Defendan-defendan telah menjimat masa dan I mengelak daripada perlu bersusah payah mengadakan perbincangan dan perundingan yang menjerihkan dengan para pelanggan, usaha yang dimasukkan bagi menyimpulkan senarai nama dan alamat para pelanggan dan pembekal dan terutama sekali kos dan harga yang hanya boleh didapati daripada prinsipal/ pembekal luar negeri (lihat ms 652D–F).

(6) Kelewatan selama hampir 18 bulan sebelum writ yang memohon, antara lain, injunksi terhadap defendan-defendan, boleh diterima. Suatu injunksi interlokutori atau interim diberikan sebelum perbicaraan sesuatu tindakan, objeknya untuk mengekalkan status quo sehingga persoalan yang menjadi isu di antara pihak-pihak boleh ditentukan di perbicaraan. Dengan itu, suatu darjah kelewatan yang lebih rendah mencukupi bagi menghalang plaintif daripada meminta relief interlokutori berbanding dengan memperolehi injunksi tetap, berdasarkan alasan bahawa penolakan injunksi interlokutori hanyalah penolakan sementara, manakala penolakan injunksi tetap di perbicaraan tindakan menunjukkan bahawa plaintif telah gagal membuktikan kewujudan haknya di sisi undang-undang. Tambahan lagi, injunksi interlokutori hanya diberikan dalam perkara yang memerlukan tindakan segera, agar plaintif yang lewat menunjukkan ketiadaan sebarang kecemasan yang memerlukan relief segera. Namun demikian, kelewatan kurang penting dalam suatu guaman yang memohon relief interim berbanding dengan relief interlokutori (lihat ms 652I dan 653A–C); *Alfred Templeton v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 diikut.

(7) Pecah amanah juga harus dianggap sebagai tort dengan ganti rugi untuk diawardkan kepada plaintif yang berjaya. Oleh kerana kategori liabiliti tort masih terbuka, kepintaran minda manusia boleh dan patut membawa kepada kewujudan kategori tort yang baru, dan ini termasuk tort untuk pecah amanah (lihat ms 653E–F).

(8) Bantahan defendan-defendan tentang kebolehterimaan cetakan dokumen komputer yang terkandung dalam ikatan dokumen plaintif dan bahawa yang sama ditandakan untuk pengenalpastian sahaja adalah tidak senonoh dan mengelirukan. Bantahan dibuat menurut s 90A Akta tersebut. Seksyen tersebut menghendaki bahawa sebelum dokumen sedemikian diterima, perakuan yang ditandatangani oleh seseorang yang sama ada sebelum atau selepas pengeluaran dokumen itu oleh komputer adalah bertanggungjawab bagi pengurusan pengendalian komputer itu, atau bagi perjalanan aktiviti-aktiviti yang baginya komputer itu digunakan mestilah dikemukakan kepada mahkamah. Walau bagaimanapun, pengarah urusan plaintif telah mengemukakan dengan persetujuan perakuan yang diperlukan di bawah s 90A(2) Akta tersebut semasa perbicaraan dan perakuan bersama dengan dokumen cetakan komputer ditandakan sebagai salah satu ekshibit plaintif (lihat ms 654D–F).

(9) Apabila peguam tersebut muncul semula sebagai peguam bersama, ia seolah-olah tidak lebih daripada suatu percubaan oleh peguam tersebut untuk kembali ke kes selepas hakim menarik diri beliau. Dalam keadaan demikian, adalah mengikut kehendak peguam defendan-defendan sekiranya hakim terus menarik diri.

Selanjutnya, memandangkan tidak terdapat prasangka atau kemungkinan bahawa mahkamah berat sebelah, adalah suatu pelepasan fungsi kehakiman dan galakan penyalahgunaan prosedur sekiranya hakim masih kekal menarik diri. Tambahan

lagi, arahan yang diberikan belum lagi dibuat atau disempurnakan. Dengan itu arahan tersebut yang dibuat diketepikan (lihat ms 655I dan 656A–C); *Hock Hua Bank (Sabah) Bhd v Yong Link Thin & Ors* [1995] 2 MLJ 213 dan *Wong Foot Choy & Ors v Toong Hup (M) Sdn Bhd & Ors* [1996] 1 AMR 402 diikut.]

Notes

For a case on duty of fidelity and good faith, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 663.

For cases on breach of confidence, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 15–17.

For cases on admissibility of computer printout, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 722–723.

For cases on restraint of trade, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2049–2050.

For cases on injunction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1425–1725.

Cases referred to

Alfred Templeton v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 (folld)

Coco v AN Clark (Engineers) Ltd (No 2) [1969] RPC 41 (folld)

Hock Hua Bank (Sabah) Bhd v Yong Link Thin & Ors [1995] 2 MLJ 213 (folld)

Merryweather v Moore [1892] 2 Ch 518 (folld)

Prenn v Simmonds [1971] 1 WLR 989 (refd)

Robb v Green [1895] QB 315 (folld)

Seager v Copydex Ltd [1967] 2 All ER 416 (folld)

St Edmundsbury & Ipswich Diocesan Board of Finance & Clark (No 2) [1975] 1 WLR 468 (refd)

Wong Foot Choy & Ors v Toong Hup (M) Sdn Bhd & Ors [1996] 1 AMR 402 (folld)

Legislation referred to

Evidence Act 1950 s 90A(2)

Rules of the High Court 1980 O 24, O 24 rr 5, 16

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Cur Adv Vult

Kamalanathan Ratnam JC:

Facts

The plaintiff deals in very specialized equipment and instruments which are imported from an overseas principal/supplier to be sold to various hospitals, research centres, universities and industries throughout Malaysia.

The plaintiff had signed an exclusive distributorship agreement for the sale of testing equipment ('the Tabai products') with the overseas principal/supplier, Tabai Espec Corp but the agreement was made non-exclusive when the fifth defendant was appointed as a distributor in April 1994. The sale of other testing equipment ('Suga products') was made through Yamato Scientific Co Ltd ('Yamato'). It was an understanding that Yamato would only sell Suga products to the plaintiff in Malaysia.

The first, second, third and fourth defendants were at all material times employees of the plaintiff. The first defendant was employed in 1979 and he was a director when he left the plaintiff at the end of December 1992. The second defendant was employed in April 1989 and he was the Manager of the Technical Instrumentation Division when he left the employment of the plaintiff on 5 December 1993. The third defendant was employed in 1967 and was holding the post of Project Manager when he resigned from the plaintiff on 31 August 1993. The fourth defendant was employed in January 1989, and he was the Service Manager when he left the plaintiff's employment on 2 December 1993. The fifth defendant was a company incorporated by the first, second, third and fourth defendants on 6 December 1993. They are the only shareholders and directors of the fifth defendant. In the contract of employment between the plaintiff and the second and fourth defendants, there was a fidelity clause which read as follows:

> Fidelity
>
> During the employment with the company you shall not have any direct or indirect interest in any business similar to the company's business and you shall direct all your efforts, duties and responsibilities to further the interests of the company.
>
> Any information about the company, its dealings, transactions and financial matters are regarded as confidential and are not allowed to be divulged to any person whatsoever.

Between the period of December 1993 and January 1994, the fifth defendant had approached the existing customers of the plaintiff — namely, Sharp Roxy Corp (M) Sdn Bhd, Sime Darby Tyre Technology Centre (M) Sdn Bhd and Matsushita Electric Co (M) Bhd — for the sale of Tabai and Suga products and quotations were sent out by the fifth defendant to these customers of the plaintiff. At the material time, the fifth defendant was not the authorized agent/distributor for the sale of Tabai and Suga products. It is clear that the quotations sent out by the fifth defendant to these same customers of the plaintiff were in respect of the same equipment/instruments for which the plaintiff had earlier given its quote with the exact specifications except that the fifth defendant had quoted a reduced price. It is also a fact that in any event the plaintiff managed to secure the contract for the sale of the equipment/instruments with Sharp Roxy Corp (M) Sdn Bhd and Sime Darby Tyre Technology Sdn Bhd, but at a lower price than was initially quoted. The plaintiff contended that it had suffered losses by reason of a special discount which it had to give these customers as a result of the fifth defendant's low quotation. However, the sale to Matsushita Electric Co (M) Bhd was lost to the fifth defendant. The fifth defendant

had admitted that Matsushita Electric Co (M) Bhd had purchased the same equipment/instruments that were earlier offered by the plaintiff. The fifth defendant also admitted making a profit of between RM26,000 to RM27,000 out of this sale. The fifth defendant had also approached the overseas principal/supplier, Tabai Espec Corp and was appointed the distributor for the Tabai products with effect from 1 April 1994. Hence, the distributorship agreement with the plaintiff was made non-exclusive.

The plaintiff's cause of action

The plaintiff claimed against the defendants for the following orders:

(a) an injunction to restrain the fifth defendant (whether by itself or acting by its directors, servants, service or agents or whomsoever) from doing the following acts:

(i) using, divulging and/or disclosing any confidential information and/or trade secrets of the plaintiff (including but not limited to those particulars set out in para 8 of the plaintiff's statement of claim);

(ii) approaching any suppliers of the plaintiff with the view to induce them to appoint the fifth defendant or whomsoever as the agent/distributor of their products;

(iii) placing and/or soliciting orders from any supplier of the plaintiff with the view to obtain supply of their products, for whom the plaintiff are the exclusive agents/distributors appointed by the said supplier;

(iv) taking and/or soliciting orders or otherwise dealing with each and every customer of the plaintiff, with whom the plaintiff has a business dealing for the sale of equipment and instruments to the customers;

(b) an injunction to restrain the first, second, third and fourth defendants and each of them (whether acting individually or collectively and through his servants or agents) from using, divulging and/or disclosing to the fifth defendant or whomsoever, any confidential documents (including 'project lists') and also confidential information and/or trade secrets of the plaintiff (including but not limited to the particulars set out in para 8 of the plaintiff's statement of claim);

(c) that the first, second, third and fourth defendants do forthwith cause to deliver up the confidential documents (including 'project lists') and any confidential information and/or trade secrets of the plaintiff, which are in the possession, power or custody of either of the defendants, the use or disclosure of which would offend against the foregoing injunction or any of them;

(d) an inquiry as to damages suffered by the plaintiff and to be paid by the first, second, third, fourth and fifth defendants to the plaintiff;

(e) an account of profits made and to be paid by the first, second, third, fourth and fifth defendants to the plaintiff;

(f) interest as it deems fit by this Honourable Court; A

(g) costs; and

(h) any further order and/or relief as this Honourable Court may deem fit and proper.

The final prayer was no doubt to enable the judge to make any further consequential orders if the plaintiff was successful. B

Breach of duty of fidelity and good faith

The plaintiff contended that the defendants had breached their duty of fidelity and good faith while in the employment of the plaintiff by taking away and making copies of the confidential information and/or trade secrets of the plaintiff. I find that this duty of good faith or fidelity does not just require that the employee refrains from misuse or from disclosing information whilst still in the employment of the plaintiff. To my mind, there is also an implied duty that prohibits the employee from using any confidential information obtained during his employment without the D employer's consent for his own or someone else's use after the employment contract ends. Thus, it is a breach of the fidelity clause and the implied duty to remove a customer list or to deliberately set out to memorize the said list with the intention of using it later, even though any use or disclosure is confined to the post-employment period. In such a case, the E eventual exploitation of the information is considered to be no more than an extension of the original breach of good faith and fidelity. In *Robb v Green* [1895] 2 QB 315, the Court of Appeal held that the employee was in breach of an implied term of the contract of service in making copies of his employer's list of customers' names and addresses, with the intention of using it for the purpose of soliciting orders from them after he had left F his employer's service and set up a similar business on his own account.

Lord Esher MR said at pp 316 and 317:

> The question is whether such conduct was not what any person of ordinary honesty would look upon as dishonest conduct towards his employer and a dereliction from the duty which the defendant owed to his employer to act G towards him with good faith. I think the judge was perfectly justified in holding that such conduct was a breach of the trust reposed in the defendant as the servant of the plaintiff in his business. The question arises whether such conduct is a breach of contract. That depends upon the question whether in a contract of service the court can imply a stipulation that the servant will act with good faith towards his master. In this case, it is said that H the contract of service was in writing; but there is nothing in the express terms of the contract that contradicts such an implication. I think that in a contract of service the court must imply such a stipulation as I have mentioned, because it is a thing which must necessarily have been in view of both parties when they entered into the contract.

I am in total agreement with the passage quoted. It is not possible to I envisage that a master would have reposed upon his servant confidential material nor put him into a position of confidence to enable that servant to use it against him or in competition with him.

A In *Merryweather v Moore* [1892] 2 Ch 518, upon completing a term of apprenticeship with the plaintiffs, a firm of engine-makers, the defendant was retained in their employment as a paid clerk, but he ultimately left their service for that of another firm of engine-makers. Two days before leaving the plaintiffs' service, he compiled for his own purposes — and without their knowledge or consent — a table of dimensions of various B types of engines made by them, and this table he had in his possession when he entered the service of his new employers, who subsequently exposed for sale an engine, it was said, of dimensions corresponding to dimensions given in the table, though this was denied. The court held that in compiling and retaining the table for his own purposes, the defendant C had committed an abuse of the confidence ordinarily existing between a clerk and his employer, or a breach of the implied contract apparently arising from that confidence; the confidence being that a servant shall not use, except for the purposes of service, the opportunities which that service gives him of gaining information; and accordingly that the plaintiffs were entitled to an interim injunction restraining the defendant from publishing D or communicating the table or its contents to any person.

It is not difficult to see that this court has the jurisdiction to put right any violation of any right whether arising out of a breach of contract or of confidence. In fact, the confidence reposed postulates an implied contract. Therefore, where the court finds that there is in existence a confidential E relationship between two parties, the court can infer an implied contract arising out of that confidential relationship.

In the case before me, apart from the general duty of good faith and fidelity, the first, second, third and fourth defendants, and through them the fifth defendant, as ex-employees are also under an implied duty not to F use, divulge and/or disclose to whomsoever, any confidential information and/or trade secrets obtained during the course of their employment with the ex-employer after the employment had ceased for their own or the fifth defendant's benefit to the detriment of the plaintiff. I find that the defendants herein had used, divulged and/or disclosed confidential information and/ G or trade secrets of the plaintiff. In *Seager v Copydex Ltd* [1967] 2 All ER 416, Lord Denning MR did not even want to consider the question of an implied contract; he however relied on equity. He said at p 417:

> The law on this subject does not depend on any implied contract. It depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of H it to the prejudice of him who gave it without obtaining his consent.

In *Coco v AN Clark (Engineers) Ltd (No 2)* [1969] RPC 41, Megarry J held that in order to succeed in an action for breach of confidence the plaintiff must establish to the satisfaction of the court three elements, namely that:

I (1) the information which the plaintiff is seeking to protect is of a confidential nature;

(2) the information in question was communicated in circumstances importing an obligation of confidence; and

(3) there must be an unauthorized use of that information to the detriment of the party communicating it. A

From the facts adduced, I have no hesitation in holding that the plaintiff has satisfied me in respect of all three elements as against all the defendants. Hence, the defendants herein who came into possession of confidential information, knowing it to be such, come under a duty not to take unfair B advantage of it or to make use of it to the prejudice of him who gave it without obtaining his consent. The fifth defendant to whom the information has been wrongfully revealed also comes under a duty of confidence to the original confider, that is, the plaintiff in this case. It is therefore necessary to grant the equitable relief of an injunction against the fifth defendant as well as against the rest of the defendants. C

The evidence

From the evidence adduced, I gather that the sales process starts with the customer informing the plaintiff that it requires a particular instrument or equipment for its department. The plaintiff will then send a sales engineer D to finalize the specifications of the particular equipment or instrument. The details of the specifications will depend on the specific needs and requirements of the customers.

Upon finalization of the specification, the plaintiff will then call up the overseas principal/supplier to determine the cost price. In some cases, E the costs may be obtained from the price list provided by the supplier. The selling price of each instrument and equipment depends on the prevailing exchange rate, the particular specification requested by the customer and the marked-up profit margin. Different customers would require different specifications relating to the humidity and temperature range of each F equipment. The sales engineer will do a manual calculation to determine the nett selling price of the equipment and instrument. He will then offer a quotation to the customer based on the configuration and specification that had been discussed earlier. The quotation sent to the customer could be for budgetary purposes, to source for funds or it could be for evaluation for tendering purposes. The plaintiff will constantly monitor and follow up G with the customer.

The nett selling price of the products is usually fixed by determining the cost price of the instrument/equipment from the overseas principal/ supplier. These costs can be obtained from the price list provided by the overseas principal/supplier directly. Based on this cost price, the plaintiff H would then add the freight charges, customs duties and all other incidental expenses to arrive at the landed costs.

The overseas principal/supplier will provide the plaintiff with information in the form of catalogues, literature, details of the specifications, repair and maintenance, materials and price lists. I

The plaintiff had implemented a project monitoring system to monitor the sales activities of its divisions. The system would describe the projects that are on-going at that time. Among the information contained in the system are customers' names and addresses, contact persons and telephone

numbers, quoted price, contract value, a brief description of the product or equipment offered to the customer and the date of the next follow-up week.

It was conceded by the defendants that cost prices are to be regarded as confidential information, as they are not generally known in the market.

PW2, Chew Kong Sen, the manager of the service division of the plaintiff testified that there were records of the customers' data base and service lists, which contain information relating to the names and addresses of the customers, contact person, telephone numbers, names of the equipment, model number, serial number, customer's requirement and value of the service contract. These information were kept in a diskette, which was compiled by the fourth defendant. On two or three occasions, PW2 had spoken to the fourth defendant relating to the handing over of the customers data base and service lists, but the latter had refused to hand over the same. There was an occasion when PW2 saw the fourth defendant printing out the data from the computer in his room. PW2's room was immediately next to the fourth defendant's and he could see through the glass partition what the fourth defendant was doing at that time. PW2 was not cross-examined as to the conversation nor was it put to PW2 that there was no such conversation. The fourth defendant had further admitted in his evidence-in-chief that he kept records of the names and addresses of the customers and that such information was maintained in the computer and in a separate book. He merely denied that he had taken away the information. In his evidence-in-chief, the fourth defendant stated that he left everything in his room. In respect of the evidence of PW2 that he saw the fourth defendant printing out the information from the diskette, the fourth defendant sought to tender a sketch plan showing the location of his room and PW2's room. However, PW2 was never cross-examined on the sketch plan and neither was it suggested to PW2 that from where he was sitting he could not possibly see what the fourth defendant was doing due to the positioning of the computer. It was merely suggested to PW2 during cross-examination that PW2 could not see clearly due to the distance of approximately six feet. The law journals are replete with cases which suggest the need to put one's case to the other side. In fact, during the cross-examination of DW4 when asked why the sketch plan was not shown nor put to PW2, the fourth defendant's baffling answer was that the idea did not come to him then. I see no reason why, if there was any truth in the suggestion that PW2 could not have seen what he said he saw, it did not occur to DW4 to have thought of the idea of the sketch plan at that stage. The truth of the matter lies in DW4's answer. It did not occur to him then and so it is nothing more than an afterthought. Surely the most interested party was PW2. He was never given the opportunity to refute, or to agree with, the key and sketch. In the circumstances, I have no hesitation in accepting the evidence of PW2. Further, considering the candid manner in which he gave his evidence, I have no reason not to accept PW2 as a witness of truth.

From the plaintiff's evidence, it is obvious that prior to the first to the fourth defendants leaving the employment of the plaintiff, there were no

other competitors in the market for the Tabai and Suga products and that the plaintiff was the only agent for the Tabai and Suga products in Malaysia. The defendants had access to a great deal of confidential information and/or trade secrets of the plaintiff. There was information relating to cost prices, quoted prices, specific needs and requirements of the customers and suppliers, status of all on-going negotiations with the customers, and price list. This information is highly confidential in nature, and not generally known in the market. The disclosure of this information, to my mind, would no doubt cause detriment to the plaintiff in terms of business and reputation. The competitor may under cut the plaintiff in terms of prices, and interfere with the ongoing contracts. The customers can lose trust with the plaintiff. In fact, the plaintiff referred to PBD 55-56 which was a copy of a letter from the overseas principal/supplier, Tabai Espec Corp, addressed to the fifth defendant informing it not to approach the plaintiff's customers to promote or to sell Tabai products.

The turnkey project

According to PW3, the second defendant had mentioned to him a turnkey project involving an overseas principal, Yamato. The second defendant had also informed PW3 that the plaintiff had decided not to put a bond on him because he had secured the turnkey project from the overseas principal. However, PW3 was not cross-examined by the defendants in respect of the conversation that took place between the second defendant and PW3.

Whilst admitting that costs price and quotation are confidential information, DW1 could not produce any documents to show that these were Tabai and Suga products which were commonly sold by other companies in the market. When DW1 was cross-examined as to where he obtained the cost price, he said that one Mr Nishiyuma had given him the list. Neither was the said list tendered nor was Mr Nishiyuma called to give evidence. When DW1 was asked why the fifth defendant sold Tabai products even though it was not an authorized agent, the reply was 'we needed sales and income'. There was also no satisfactory explanation as to how he knew that the customers were looking for the particular equipment except through market information and other suppliers; however, no one was identified nor was anyone called to give evidence to this effect.

The confidential nature of the information

The plaintiff seeks from this court the protection to restrain further unauthorized use and/or disclosure of its confidential information and/or trade secrets. I am constrained to hold that the nature of the information, in the light of the plaintiff's business and its trade practice, compels this court to grant the protection the plaintiff seeks. It is my judgment that trade secrets are not limited to manufacturing processes or secret formulae but extend to information relating to the list of names and addresses of the customers and suppliers, specific questions sent to the customers, costs prices, specific needs and requirements of the customers and status of the ongoing negotiation with the customers. Therefore, it is my finding that in

A the light of the particular trade setting of the plaintiff's business, the above mentioned information had the necessary quality of confidentiality. The first, second, third and fourth defendants are not entitled to make use or make copies of the said information for the benefit of the fifth defendant in competing with the plaintiff's business.

B *Unauthorized use and/or disclosure of confidential information*

It cannot be denied that the first to the fourth defendants, in view of the senior positions they held in the plaintiff, had access to a great deal of confidential information and/or trade secrets of the plaintiff. I cannot but infer that in approaching the customers of the plaintiff for the sale of the C same equipment, that was earlier quoted by the plaintiff itself, the defendants must have made use of or taken and/or made copies of the confidential information and/or trade secrets of the plaintiff. This is a matter which is strictly within the specific knowledge of the defendants alone and no one else. In my view, the plaintiff is entitled to rely on an irresistible inference D that the defendants had made use of the confidential information and/or trade secrets of the plaintiff because of the admitted similarity of the quotation sent out by the plaintiff and the fifth defendant to Sharp Roxy Corp (M) Sdn Bhd and the other so-called coincidences of the fifth defendant approaching the other customers of the plaintiff for the sale of an identical equipment with the exact specifications, except for a lower price.

E

Conflicting stories of the defence

The defence was a denial of having approached the plaintiff's customers. However, during the trial the defence sought to rely on an entirely new defence — that is, that they had received market information from the F suppliers and customers. However, when the customers were giving evidence in court, such a suggestion was never put to them. Not one of the suppliers was called to give evidence. Surely this court is entitled to rely on s 114(g) of the Evidence Act 1950 and to invoke the presumption of adverse inference due to the failure of the defence to call material witnesses. G Further, the fifth defendant would not know the specific needs and requirements of the customers in relation to the particular equipment that was earlier offered to the customers unless it had gone through the same process of negotiation with the customers. No evidence was led by the defendants as to whether such negotiation had taken place or not. In fact, the fifth defendant had admitted that it had no customers at the time of its H commencement of business, that is, 6 December 1993. It is my judgment that the evidence led by the defence at the trial had failed to explain several circumstances, thus giving rise to an irresistible inference that the defendants had used and/or made copies of the confidential information and/or trade secrets of the plaintiff. Neither were the defendants able to provide credible I evidence as to how they arrived at the nett selling price without the price lists/cost price.

Further, the details of the specification could not be obtained from market information unless it was copied from the plaintiff's documents. It

is pertinent to note that the fifth defendant was not an authorized dealer/ distributor but managed to approach at least three customers of the plaintiff for the sale of Tabai and Suga products, within one month after its incorporation. However, during cross-examination of DW5, Ong Han Suan who represents the fifth defendant, he said that when the fifth defendant commenced business, it did not deal mainly with Tabai and Suga products. However, evidence revealed that a quotation was sent out for Tabai products, in less than two weeks after commencement of business. DW5 also stated that the fifth defendant had received market information from the suppliers and customers without identifying these people nor calling them to give evidence in court.

The court's findings

I find that the alleged breaches of the defendants can be established and/ or inferred from the following salient evidence adduced at the trial:

(a) Upon close examination of the fifth defendant's letter of offer (PBD 34–35), it is revealed that the documents contain specific information relating to a particular Tabai equipment, and that one of which corresponds exactly in fact and content with that of the plaintiff's earlier letter of offer dated 28 October 1993 (PBD 19–20). The question that arises is: where did the fifth defendant obtain the information relating to the specification of the particular equipment, since the fifth defendant was not the authorized agent at the material time? No evidence was led by the defendants to show the source of the information, apart from stating standard model and market information. Certainly such detailed information could not possibly be obtained from any other source except from the plaintiff.

(b) The information relating to the specific requirements and needs of the customers in respect of the particular equipment was highly confidential in nature and sensitive to its competitor. There is also no credible evidence led by the defendants as to the circumstances giving rise to the letter of offer dated 17 December 1993. Apart from the specification of the equipment which was identical, I cannot but conclude that the nett selling price could only have been configurated after obtaining the cost price from the principal/supplier and when at that time the plaintiff was the exclusive agent/distributor for Tabai products. I have no hesitation in concluding that the fifth defendant had in all probability received and/or obtained the information from the documents belonging to the plaintiff.

(c) The plaintiff had clearly established that the information relating to the current sales status of its products to the customers was highly confidential in nature, and it is reasonable therefore to infer that in approaching the existing customers of the plaintiff and offering the same equipment, albeit at a lower price, the fifth defendant ought to have used and/or obtained confidential information and/or trade secrets of the plaintiff. No plausible explanation was given by the

A defendants in respect of such coincidences within such a short time, after the fifth defendant was incorporated.

(d) Between December 1993 and January 1994, the fifth defendant had admittedly sent similar quotations at a reduced price to the existing customers of the plaintiff, namely Sharp Roxy Corp (M) Sdn Bhd, Sime Darby Tyre Technology Centre (M) Sdn Bhd and Matsushita Electric Co (M) Bhd. According to the evidence of PW5, PW6 and PW7 — the customers of the plaintiff — the fifth defendant had approached them for the sale of Tabai and Suga products in which the plaintiff had an ongoing negotiation with the said customers for the same equipment/instrument at that time.

(e) No evidence was led to show that the fifth defendant knew of the customers' needs and requirements through negotiations/discussions with them. In the absence of such evidence, it is an irresistible inference which I draw that such information had been obtained from the plaintiff. It is highly probable that the confidential information and/or trade secrets relating to each and every existing customer of the plaintiff was passed on to the fifth defendant with a view to competing with the plaintiff's business.

(f) It was never disputed that the fifth defendant had also approached the overseas principal/supplier of the plaintiff, that is Tabai Espec Corp, with a view to inducing them to appoint the fifth defendant as its agent/distributor, though the first, second, third and fourth defendants knew that the plaintiff was the exclusive agent/distributor at the material time. It is rather obvious that the defendants had intended that if they could sell Tabai products to the customers of the plaintiff, the overseas principal/supplier would not have renewed and/or continued with the exclusive distributorship agreement with the plaintiff. This the defendants were not entitled to do as it would interfere with the plaintiff's business.

In view of the aforesaid, it is my judgment that there is sufficient material to prove on a balance of probabilities that the defendants had taken and/or made copies of several confidential documents and/or trade secrets of the plaintiff and had used the same for the benefit of the fifth defendant. Upon evaluation of the evidence in its entirety, it is open for me to find that the first, second, third and fourth defendants had the intention to use the confidential information and/or trade secrets of the plaintiff to compete with the plaintiff's business, in approaching the existing customers and suppliers of the plaintiff. The relationship between the fifth defendant and the other defendants is such that the working minds behind the fifth defendant must necessarily be the first, second, third and fourth defendants who are the only shareholders and directors of the fifth defendant. Therefore, I cannot but find that any such information obtained and/or received and/or used by the fifth defendant, would have presumably come either individually or collectively from the first, second, third and fourth defendants. Having considered the positions held by the four whilst in the employment of the plaintiff, I find that the defendants were aware or ought

to have been aware that the information was trade secret and/or confidential and that the disclosure of which would be detrimental to the plaintiff's business.

Is there restraint of trade?

I also find that it is not the plaintiff's case to restrain the defendants from entering into the same trade as the plaintiff. The plaintiff's case is to restrain them from using, disclosing and/or divulging confidential information and/or trade secrets of the plaintiff to the detriment of the plaintiff. Clearly, the allegation of restraint of trade must fail.

Was the documents the product of unique intellectual work

The defence contended that the documents referred to by the plaintiff as being confidential must be the product of unique intellectual work and ingenuity which only the plaintiff and its employees could produce. Since the information was merely a 'configuration' of data supplied by the manufacturers for the purpose of arriving at the selling price, it was neither unique intellectual work nor ingenious. The defence argued that every trader in its normal course of business fixes a price for a product sold to customers in the same way as the 'configuration' referred to by the plaintiff.

I reject the argument of the defendants. No doubt that the method of configuration is not confidential but what makes it confidential is the compilation of lists of the names and addresses of customers, specific needs and requirements of the customers and their budget and the costs and prices of the equipment obtained from the overseas principal/supplier. The defendants had saved themselves the time and trouble of having to go through laborious discussions and negotiations with the customers, the effort put in to compile the list of names and addresses of customers and suppliers and above all the costs and prices which are only available from the overseas principal/supplier.

Delay

The defendants argued that since it was contended by the plaintiff that it had suffered at the hands of the defendants from early 1993, the delay of nearly 18 months before the writ was filed on 27 April 1994 was unacceptable. Quoting equitable maxims, the defendants contended that since the issue of delay was successfully upheld by this court in rejecting the application for interlocutory injunction, I was bound by that decision in respect of the main trial where various similar injunctions were again sought.

This argument of the defendants is flawed from the outset. The grant of an interlocutory injunction ought to be distinguished from the grant of a permanent injunction. A permanent injunction is granted only after the plaintiff has established its right and the actual or threatened infringement of its rights by the defendants at the conclusion of the trial. An interlocutory or interim injunction is granted before the trial of an action, its object

being to maintain status quo until the question at issue between the parties can be determined at trial. Therefore, a lesser degree of delay or laches suffices to debar a plaintiff from seeking interlocutory relief than from obtaining a permanent injunction for the reason that a refusal of an interlocutory injunction is merely a temporary rebuff, whereas the refusal of a permanent injunction at the trial of the action shows that the plaintiff has failed to establish the existence of its right in law. Moreover, interlocutory injunction is granted only in matters of urgency so that a plaintiff who delays thereby demonstrates the absence of any urgency requiring prompt relief. Delay is, however, less significant, in a suit, seeking final, as opposed to interlocutory, relief (see *Alfred Templeton v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202.)

Having considered all the facts, submissions and authorities submitted by both sides, I granted an order in terms of all the prayers sought by the plaintiff. Costs no doubt to follow the event.

Is there an action in tort for breach of confidence?

Whilst I have already considered in the course of this judgment that the confidence reposed postulates an implied contract and also Lord Denning MR's views as expressed by him in *Seager v Copydex Ltd* [1967] 2 All ER 416 that equity would interfere to prevent those receiving information in confidence from taking unfair advantage of it, I am of the view that a breach of confidence should also be regarded as a tort with damages to be awarded to the successful plaintiff. After all, the word tort is derived from the Latin 'tortum' which means a wrong; and a tort is nothing more than a breach of a duty, other than under contract leading to an award of damages. Since the categories of tortious liability remain open, the ingenuity and resourcefulness of the human mind can and ought to lead to fresh categories of tort being established. Into the list of categories of tort, I would include breach of confidence.

Non-admission of computer generated documents

In the course of getting this case ready for trial, I had conducted numerous case managements, the purpose of which was to prod the parties to get going. On 17 February 1996, I conducted the first case management of this case. Having gone through the file with both counsel, I directed that on the next case management date, that is on 12 March 1996, I would hear encl 27 which was the summons for directions. On the second case management date, having given the orders and noting the number of witnesses needed by each party, I fixed the trial dates to 24 and 25 June 1996. I then fixed the next case management to 6 April 1996 by which time each party was directed to comply with O 24 of the Rules of the High Court 1980 ('the RHC'). On the third case management date, whilst the plaintiff had complied with my direction to file the affidavit verifying the list of documents, the defendants had failed to do so. In spite of my warning that I would exercise my discretion pursuant to O 24 r 16 of the RHC and act against the party failing to comply, Mr Venu Nair for the

defendants failed to comply with my directions. On his plea, I granted an extension of one week to enable him to comply and set the next case management to 13 April 1996. On the fourth case management date, the defendants had complied and I then gave my next final directions which was that the parties ought to agree to documents and file one common agreed bundle of documents. Instead each party filed its own bundles, marked plaintiff's bundle of documents ('PBD') and defendants' bundle of documents ('DBD'). I had also directed that each party was to compile its list of documents shown in Sch 1 Pt 1 pursuant to O 24 r 5 of the RHC and to have the same list of documents bundled and filed for easy reference. Whilst the plaintiff had complied with the same, the defendants had not. Rather than adjourning the case, I marked the respective bundles as filed by each party, and proceeded with the case.

When it came to pp 22–30 of PBD being the computer printout of documents, Mr Nair raised objections as to their admissibility pursuant to s 90A(2) of the Evidence Act 1950 which requires that before such a document is admitted in evidence there must be tendered to the court a certificate signed by a person who — either before or after the production of the document by the computer — is responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used. Since no such certificate was tendered, I was compelled to mark the documents in pp 22–30 of PBD for identification only.

However, when PW8, Andreas G Heckel-Heymann, the managing director of the plaintiff, took the stand, he tendered by consent the certificate required under s 90A(2) of the Evidence Act 1950 and the said certificate together with pp 22–30 of PBD were marked as P1A-1. It is therefore highly improper and misleading of the defendants to maintain in their submission that the said documents remained as ID only. In the circumstances, since the documents were agreed and admitted, I accepted the contents of the documents as true.

Counsel discharging himself and coming back

After much turbulence even before it took off the ground, the case finally proceeded. When PW8 was being cross-examined by Mr Venu Nair, a question by him (p 44 of the notes of evidence) prompted the court to ask Mr Wong, counsel for the plaintiff, for a copy of the pleadings as there was no copy of the bundle of pleadings in the court file. At this stage, Mr Wong informed the court that he had not filed the bundle of pleadings because he had misplaced the copy of the defence served on him and that in spite of repeated requests, Mr Nair had not sent him a copy. When asked by the court why this issue was not raised during the case management stage, Mr Wong said that he trusted Mr Nair and when I asked Mr Nair why he had not served a copy on Mr Wong his reply was that he was busy. Again not wanting to adjourn the matter unnecessarily, I directed Mr Wong to file the bundle of pleadings the next day. The case then proceeded. Mr Nair then raised certain issues during his cross-examination which required

A the court to enquire if he had pleaded the said issues. Mr Nair contended that he had made a general statement. When I further enquired if he had descended into particulars, Mr Nair readily admitted he had not. On this admission, I ruled that he was not entitled to proceed on an issue not raised in his pleadings. With that he ended his cross-examination. After the re-examination I adjourned to the next day for the defence to commence.

B

After DW1 was sworn in, Mr Nair informed the court that his clients wished to discharge him the reason being that because of the questions directed at him by the court, his clients felt that the court might be prejudiced. I granted his oral application for discharge and since the defendants were unrepresented, I refused to proceed further with the case

C without the defendants being represented. At that time, in view of what was expressed by Mr Nair's clients, I felt that justice would not be seen to be done if I continued to preside over the case. As I did not want the defendants to think for even a moment that this court would be swayed by anything else other than the evidence placed before it, I therefore disqualified

D myself from further hearing this case and directed that it be transferred to another Court of the same division.

However, the plaintiff promptly filed an application (encl 54) for an order that the direction that I made on 26 June 1996, whereby I disqualified myself, be set aside and that I do continue to hear the case. The first issue was whether I should even hear the application.

E

My anxiety to see that justice was seen to be done seemed ill-founded when the same Mr Nair who had discharged himself now appeared as co-counsel with Mr Kenny D'Cruz. Both Mr Nair and Mr Wong agreed that my reason for disqualifying myself was because Mr Nair had applied to discharge himself. I then directed Mr D'Cruz to address me as to why I

F should not grant an order in terms of encl 54 since Mr Venu Nair was continuing to have conduct of this case.

Mr D'Cruz submitted that once an order had been made by a judge it cannot be set aside by the same judge unless there were provisions in the RHC giving the court the power to set aside its own order such as in O 35

G r 2 of the RHC. He suggested that Mr Wong ought to have appealed against my order. He argued that there was no application initiated by either counsel to disqualify the judge. Having considered the matter and having disqualified myself, I was urged not to invoke O 92 r 4 of the RHC.

In reply, Mr Wong submitted that when I made the order on 26 June

H 1996 he was not heard. The court disqualified itself because Mr Nair had discharged himself and not for any other reason.

Having applied for and obtained an order discharging himself, Mr Nair then proceeded to affirm an affidavit, encl 56, in which he maintained at para 1 that he was the solicitor in charge of the conduct of this case. To my

I mind this is nothing more than an attempt by counsel to return to the case after the judge had disqualified himself. In the circumstances, it was clear to me that I would be falling in line with the wishes of counsel for the defendants if I continued to remain disqualified when even Mr Nair had

come back into the picture. Moreover, the direction I had made had not been drawn up nor perfected. I therefore granted an order in terms of encl 54. On hindsight and after perusal of the notes of proceedings, I find no reason to suggest that this court would be biased. Upon reading the Court of Appeal decision in *Hock Hua Bank (Sabah) Bhd v Yong Link Thin & Ors* [1995] 2 MLJ 213, I find that this case is not one from which the judge should disqualify himself. The decision of Richard Talalla J in *Wong Foot Choy & Ors v Toong Nup (M) Sdn Bhd & Ors* [1996] 1 AMR 402 also lays down clear principles of law as to when a judge should disqualify himself. As there would be no bias or any real possibility that I would be biased in my judgment, it would be an abdication of judicial function and an encouragement of procedural abuse if I were to remain disqualified. A solicitor who ignores the specific instructions of a judge given to expedite and provide a timetable for any court proceedings must be prepared for any rebuke from the presiding judge. In the circumstances, I saw no reason not to continue hearing this case.

Application allowed.

Reported by Ooi May Ling